United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

Original with affidavit of mailing

74-2264

To be argued by
PAUL F. CORCORAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2264

UNITED STATES OF AMERICA,

Appellee,

—against—

DENNIS DRUMMOND,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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TABLE OF CASES

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UNITED STATES OF AMERICA,

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BRIEF FOR THE APPELLEE

Preliminary Statement

Dennis Drummond appeals from a judgment of conviction entered on September 20, 1974 in the United States District Court for the Eastern District of New York, convicting him, after a jury trial before the Honorable Thomas C. Platt, of conspiring with one Donald Days on February 10, 1972 to possess and distribute approximately 125 grams of heroin in violation of Title 21, United States Code, Section 841(a) and Section 846.*

Appellant was sentenced to five years imprisonment pursuant to Title 18, United States Code, Section 4208

* This was appellant's third trial. His first trial ended in a mistrial when the jury was unable to reach a verdict; and his second trial resulted in a conviction which was later reversed by this Court. *United States* v. *Drummond*, 481 F.2d 62 (2d Cir. 1973).

(a)(2), plus an additional special parole term of five years.* He is free on bail pending appeal.

On this appeal, appellant does not challenge the sufficiency of the evidence against him; rather it is alleged that (1) the delay of one year in retrying him violated Rule 6 of the Eastern District Plan for Prompt Disposition of Criminal Cases; (2) the delay similarly violated his constitutional rights to a speedy trial; (3) the District Court erroneously allowed the Government to show that he had engaged in a similar drug transaction on February 3, 1972, one week before the instant offense.

Statement of the Case

A. Prior Proceedings

On June 1, 1972 an indictment (72 CR 650) was returned in the Eastern District of New York, charging appellant in three counts of a thirteen count indictment with: (1) conspiring with Donald Days to possess and distribute approximately 125 grams of heroin in violation of Title 21, United States Code, Section 846 (Count 8); (2) possessing approximately .75 grams of cocaine in violation of Title 21, United States Code, Section 844(a) (Count 9); and (3) possession of approximately .25 grams of heroin in violation of Title 21, United States Code, Section 844(a) (Count 10).**

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* Judge Platt imposed the same sentence as appellant had received from Chief Judge Mishler on February 15, 1972 on his prior conviction.

** Counts 9 and 10 of indictment 72 Cr. 650, which charged appellant alone with possession of small amounts of heroin and cocaine, were severed by Chief Judge Mishler in order to avoid possible prejudice. *But see United States* v. *Purin*, 486 F.2d 1363, 1367 (2d Cir. 1973). Since the other 10 counts, which charged Walter and Donald Days (brothers) with various narcotics transactions, were disposed of, appellant was tried alone on Count 8—conspiracy to distribute 125 grams of heroin on February 10, 1972.

On October 3, 1972 petitioner's first trial commenced before Chief Judge Jacob Mishler and a jury. It ended in a mistrial on October 6, 1972, when the jury was unable to reach a verdict. A second trial was begun on October 18, 1972, which resulted in a conviction on the conspiracy count on November 2, 1972. On December 17, 1972, petitioner was sentenced to a term of five years imprisonment and to a special parole term of five years.

On July 5, 1973, this Court reversed the judgment of conviction because of prosecutorial misconduct, and a new trial was ordered. For some reason, not shown in the record, the mandate of this Court did not issue until September 14, 1973. Upon receiving the mandate, on September 19, 1973, the Clerk's office of the United States District Court for the Eastern District of New York assigned the case, by random selection, to Judge Travia to hear the proceedings on remand.

Within three weeks of the receipt of the mandate, on October 1, 1973, Judge Travia began a trial, *United States* v. *Bernstein, et al.*, 72 CR 587, which was to last nine months, until July 5, 1974. Accordingly, Judge Travia's trial calendar remained static and the appellant's case was not called until April 12, 1974. Four days later, on April 16, 1974, appellant filed a motion to dismiss, returnable May 3, 1974. Appellant's April 16, 1974 motion, the first he filed since the remand some seven months earlier, was based on Rule 6 of the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases (hereinafter the "Plan").* Appellant had not to that point argued that

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* Rule 6 of the Eastern District's Plan for Achieving Prompt Disposition of Criminal Cases reads in pertinent part:

> "Retrials. Where a new trial has been ordered . . . by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause."

his constitutional right to a speedy trial had been violated, nor had he moved for a speedy trial, formally or otherwise.

On May 3, 1974 Judge Travia denied appellant's Rule 6 motion to dismiss the indictment, and reassigned the case to Judge Thomas C. Platt, who was to be sworn in as a District Court Judge on May 17, 1974 * (See Government's Appendix, 5a).

On May 31, 1974 Judge Platt called appellant's case and, with appellant's acquiescence, the case was adjourned to June 14, 1974 to permit appellant time to renew his motion to dismiss (See Government's Appendix, 6a). On June 21, 1974, appellant renewed his Rule 6 motion before Judge Platt and for the first time raised his constitutional right to a speedy trial. This latter ground was predicated on the belated discovery by defendant, who has at no time been incarcerated on this charge, that he was unable to "secure witnesses that testified at his first two trials and contributed heavily to his defense" (Affidavit in Support of Motion to Dismiss, p. 4 dated June 17, 1974).

On June 21, 1974 Judge Platt orally denied appellant's motion to dismiss, noting that it was appellant's obligation to keep track of his witnesses, not the Government's (See Government's Appendix, 12a). The trial date was set for July 12, 1974 and actually commenced on July 11, 1974.

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* On May 13, 1974, prior to Judge Platt's swearing in, appellant petitioned this Court for a writ of mandamus directing the respondents, Chief Judge Mishler and Judges Travia and Platt, to dismiss the indictment based upon Rule 6 of the Plan. Without reaching the merits of appellant's argument, the petition was dismissed on the ground that the extraordinary writ of mandamus did not lie under the circumstances. See *Drummond* v. *Travia*, Court of Appeals for the Second Circuit, Docket Number 74-1666.

B. The Trial

1. Government's Case-in-Chief

At trial, the Government's witnesses testified to the following facts:

On the evening of February 3, 1972, Detective Kenneth Bernhardt, a New York City police officer assigned to the Drug Enforcement Administration Task Force, purchased one-eighth of a kilogram of heroin at 210 Cornelia Street in Brooklyn. While acting in an undercover capacity, Bernhardt was taken to that address by one Walter Days for a pre-arranged meeting with Walter's brother, Donald Days (34).* After being admitted to 210 Cornelia Street ** by Donald Days, the agent was escorted to a "lower level living room" where he had a discussion with Donald Days relative to the purchase of heroin. Days told Bernhardt that the price for an eighth of a kilogram would be $4,250 and asked whether the agent had the money (34). Bernhardt then produced $4,250 in pre-recorded Official Advance Funds (OAF).

The events which followed were of particular import in establishing the conspiratorial method of operation.

Donald Days counted the agent's money and immediately gave it back to him. Days then left the room, returning with a gray metal box from which he removed a sum of United States currency. He explained to Bernhardt that he should hold his money for the time being and that he (Days) would use his own available cash to purchase the narcotics (34). He then went upstairs, leaving the agent in the lower level living room. Upon returning to the lower level, Days informed Bernhardt that they would have to wait for the delivery of the heroin (35).

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* Page numbers in parenthesis refer to the transcript of trial.

** 210 Cornelia Street was described as a three story brownstone having entrances on the lower or street level and the first floor (49-50).

Eventually, Bernhardt testified, he heard a doorbell ring. Donald Days left the basement, went upstairs, and returned with a clear plastic bag containing an eighth of a kilogram of heroin * and a postal scale (35). Days weighed the drug and the agent paid him the pre-recorded $4,250 in cash. Thereafter, Bernhardt left the premises and met with his surveillance agents. Before leaving, Bernhardt told Days that if the heroin were good, he would be back for more (39).

Shortly after Bernhardt left, at approximately 9:50 P.M., Detectives John J. Miller and Roman Jones, on surveillance outside 210 Cornelia Street, observed a two-tone brown 1968 Oldsmobile Toronado, bearing New York license plate number 6844KX, departing the premises at 210 Cornelia Street driven by an unidentified black male (150, 153, 167-168).

On February 9, 1972, less than a week later, Bernhardt returned to 210 Cornelia Street, where he met Donald Days and discussed the purchase of three eighths of a kilogram of heroin. Arrangements were made for a meeting the next evening for this purpose (41).

The next evening, February 10, at 8:21 P.M., Detective Bernhardt returned to the premises and met with Days, again in the lower living room area. Days told Bernhardt that "the man [is] waiting" and that he wanted to make certain that Bernhardt was going to show up "before he went to get the heroin" (42). Declining to "move" the entire purchase at one time, Days told the detective that after the one-eighth kilogram was purchased and paid for, he would get the other two. A price of $4,250 per one-eighth kilogram was again agreed upon. This conversation lasted one or two minutes (43-44).

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* A stipulation was entered on the record that had the government chemist been called as a witness he would testify that the substance purchased by Detective Bernhardt on February 3, 1972 was heroin with a purity of 16.33 percent (40).

During this conversation, appellant Dennis Drummond was about six or seven feet away, seated in a chair (42). Prior thereto, at approximately 7:55 P.M., appellant had been observed arriving at 210 Cornelia Street in the same brown Oldsmobile Toronado which had been on the scene at the time of the February 3rd transaction.* Immediately after the price was agreed upon, Days left the room, returned with his grey metal box, removed a sum of U.S. currency and handed the cash to the appellant. Days thereupon told Drummond that "it was all right [sic] to go get the stuff" (43). After receiving the money, appellant left the premises with the cash (46).**

In order to extricate himself, Detective Bernhardt told Days that he had someone waiting outside in the car for him and that he wanted to go out to tell him not to worry. Bernhardt then exited 210 Cornelia Street, went to an unmarked government vehicle and, by means of a radio transmittal, advised his surveillance team that the man who had just left 210 Cornelia Street (appellant) was going to get the narcotics and should be arrested before he returned to the premises (47). Upon exiting the premises, Detective Bernhardt noticed the Oldsmobile Toronado, with appellant inside it, pass him as he walked towards his unmarked government vehicle (46-47).

Thereafter, Detective Bernhardt returned to the basement at 210 Cornelia Street where he waited with Days for the delivery of the heroin. After waiting for a time,

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* Appellant had been separately observed by two surveillance agents (Detectives McDonald and Manning) arriving at Days' house at 7:55 P.M. in the Oldsmobile with a woman (74, 100, 130) who was subsequently identified at the trial as appellant's wife (285).

** As shown by the testimony surveilling agents Miller and Jones, appellant was on the premises for more than half an hour and left in the Oldsmobile (153, 168-169). This was the same Oldsmobile which had been observed a week earlier at the time of the first sale to Bernhardt.

they heard noise upstairs. This was at about 9:00 P.M., when other members of the Task Force entered pursuant to a search warrant. Days and all occupants in the premises, including Bernhardt, were arrested. Appellant, who had previously departed in the Oldsmobile, was arrested at about the same time a block away from Days' house. An incidental search of appellant revealed the presence of $3,750. Nearly $3,000 of that sum were the OAF used to purchase heroin from Donald Days on February 3 (81-83).*

2. The Defense Case

The appellant took the stand and offered the following explanation for his presence at 210 Cornelia Street and his possession of $3,750 at the time of his arrest:

Appellant admitted he knew Donald Days and visited his house frequently. He testified, however, that though he was at Days' house shortly before his arrest, he played no role in the heroin conspiracy which was taking place at 210 Cornelia Street on February 10, 1972. Appellant stated that the $3,750 found on his person at the time of arrest—which included $2,920 in OAF from the February 3rd transaction—comprised his winnings from a craps game in which he had participated earlier that day (259-264). According to appellant, he and his wife were merely stopping at Days' house on February 10th to see if Days and his wife wished to go out to dinner (278). He further claimed, in contrast to the testimony of the surveillance agents and Detective Bernhardt (see footnotes *supra,* at p. 7), that he was only inside 210 Cornelia Street for a few

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* The search of appellant also revealed the small amounts of heroin and cocaine which were the subject of Counts 9 and 10 in the indictment.

seconds, and that he did not meet with Donald Days or the undercover agent in the lower-level living room (291). He further stated he never saw Donald Days that night (302).

With regard to the brown Oldsmobile Toronado which appellant was driving at the time of his arrest, and which had been seen at 210 Cornelia Street during the February 3, 1972 heroin transaction, appellant testified that it was his brother's car which he had borrowed for the evening of February 10th (279-281).* He stated he did not use the car on February 3rd, nor did he ever drive it to Days' house before February 10th (284-285).

Appellant's testimony was partially buttressed by the testimony of his wife, Barbara. Mrs. Drummond testified that her husband had possession of some $3,600 on the morning of February 10th, prior to going to Days' house. While she also corroborated appellant's testimony that he left 210 Cornelia Street seconds after arriving, she admitted on cross-examination that, from her position in Mrs. Days' bedroom, she could not see whether her husband left the house or went down to the lower-level living room (223-224).

Appellant was additionally permitted to have read into evidence the prior testimony of three witnesses, James Clark, Annette Days (Donald Days' wife) and Rose Garner, who testified at appellant's earlier trials but were allegedly unavailable for the instant trial.** Of the three, only Mr.

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* Appellant conceded that his brother did not know Donald Days (285).

** While the District Court made no finding that these witnesses were, in fact, unavailable, it did instruct the jury, before the reading of their prior testimony, that they were not available to testify (341).

Clark's testimony was directly relevant to the facts in issue.*

James Clark's testimony concerned his presence at a craps game in which appellant claimed to have won the $3,600 he possessed when arrested. Clark's testimony was that he was present, as were 20 or 25 other people (365), and that he observed appellant win better than $2,500 on the morning of February 10th, which figure he remembered because he had counted appellant's money for him (367, 385). On cross-examination, he stated that he regularly visited the after hours club at which the February 10th craps game was held. He said that he knew the people there, but he could only remember their first names (376-379). Mr. Clark admitted having been convicted of narcotics possession in 1970 and grand larceny in 1965.

3. Government's Rebuttal

In rebuttal, the government produced Ron Silver, a salesman for Apex Oldsmobile, who sold the brown Toronado Oldsmobile to appellant in January of 1972, just weeks before the February narcotics transaction (391-398). Mr. Silver testified that he met with appellant seven or eight times during negotiations for the purchase of the 1968 Oldsmobile; that appellant traded in his old car and put $1000 down towards the purchase of the Toronado

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* Annette Days testified as to appellant's arrival at 210 Cornelia Street on February 10th. Like Mrs. Drummond, she stated that appellant dropped off his wife and child in Mrs. Days' bedroom and immediately left. However, on cross-examination she also admitted that after appellant left her bedroom, shutting the door behind him, she was unable to say whether he exited the house or proceeded to the downstairs living room (346). Rose Garner, who testified at the first but not the second trial, merely testified that after appellant left 210 Cornelia Street he stopped at her house to inquire about her daughter (355).

(394-396); and that at the last minute appellant had registered the car in his brother's name because he had too many traffic tickets in his own name (397). Mr. Silver never met appellant's brother (397).

ARGUMENT

POINT I

The District Court Properly Denied Appellant's Motion to Dismiss Under Rule 6 of the Plan.

Raising an issue of first impression, the appellant initially cites Rule 6 of the Eastern District Plan for the proposition that the District Court must retry a defendant within 90 days, or, absent some "good cause" for an extension, dismiss the indictment. Conceding that the prosecution was at all times ready to retry the appellant,* it is argued that, notwithstanding the state of his calendar, Judge Travia's failure to retry the case within 90 days, or reassign it to a judge who could, violated Rule 6 and requires a reversal of appellant's conviction and dismissal of the indictment against him.

The Government respectfully submits that the construction of Rule 6 proffered by appellant is inconsistent with the underlying purpose of the Plan and should therefore be rejected.

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* Appellant implies that the prosecution had some obligation to prod the Court into hearing or transferring the case. However, Rule 9 of the Plan expressly states that the Court has "the sole responsibility for setting and calling cases for trial." Moreover, the First Circuit has recently noted the impropriety of placing the prosecution in that position since it might require *ex parte* conferences between the Court and the prosecution. *United States* v. *Fay*, United States Court of Appeals for the First Circuit, Slip Op., Docket Number 74-1235, November 11, 1974.

Under general principles of statutory construction, court rules are liberally construed in "light of the history of their adoption," in order "to achieve their purposes." Sutherland, Statutory Construction § 67.10, pp. 236-237 (4th Ed). Rule 6, as part of the Eastern District's Plan, adopted pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure, should therefore be construed in light of the underlying purpose of the Plan as a whole. Insofar as the Plan is modeled upon and supersedes the Second Circuit Rules,* the purpose and goals of those Rules are equally enlightening. (See *United States* v. *Furey,* 500 F.2d 338, 342 n. 3 (2d Cir. 1974); *United States* v. *Bowman,* 493 F.2d 594, 595 n. 3 (2d Cir. 1974).

It is now well documented that both the Plan and the Second Circuit Rules which preceded it, have as their underlying purpose the "public interest" in the deterrence of crime. The defendant's personal interest, which is protected by both the Sixth Amendment and the applicable statutes of limitation, is not the object of the Plan or the Rules. *United States* v. *Flores,* 501 F.2d 1356 (2d Cir. 1974); *United States* v. *supra; United States* v. *Rollins,* 487 F.2d 409, 413 (2d Cir. 1973). Indeed the framers of the Second Circuit Rules set forth their purpose in the opening of the accompanying statement:

> The public interest requires disposition of criminal charges with all reasonable dispatch. The deterrence of crime by prompt prosecution of charges is frustrated whenever there is a delay in the disposition of a case which is not required for some good

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* Second Circuit Rules Regarding the Prompt Disposition of Criminal Cases, adopted January 5, 1971 (hereinafter the "Rules"). See *Hilbert* v. *Dooling,* 476 F.2d 355 (2d Cir.), *cert. denied,* 414 U.S. 878 (1973), upholding the Circuit Council's power to enact such rules under the supervisory powers conferred upon it by 28 U.S.C., § 332. *See also Barker* v. *Wingo,* 407 U.S. 514, 523, 530 n. 29 (1972).

> reason. The general observance of law rests largely upon a respect for the process of law enforcement. When the process is slowed down by repeated delays in the disposition of charges for which there is no good reason, public confidence is seriously eroded. (Statement of the Circuit Council to Accompany Second Circuit Rules Regarding Prompt Disposition of Criminal Cases)

In furtherance of the public interest in the deterrence of crime through the prompt trial and punishment of criminals, the Courts have fashioned a "prophylactic" set of rules which focus "primarily on prevention of prosecutorial delay" *Hilbert* v. *Dooling, supra,* 476 F.2d at 357. *See also United States* v. *Bowman, supra,* 493 F.2d 594 (2d Cir. 1974). "It is intended to through the rules to prod the United States Attorneys to take whatever steps . . . necessary to dispose of criminal cases rapidly." *United States* v. *Favaloro,* 493 F.2d 623, 625 (2d Cir. 1974). Accordingly, the tenor of both the Plan and the Rules is that the Government must be "ready" for trial within a specific period of time or suffer dismissal of the case.* In keeping with the public interest, and further

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* Rule 4, the scope and applicability of which are clearly set forth in its heading—"All Cases: Trial readiness and effect of non-compliance"—reads, in pertinent part:

> "In all cases the government must be ready for trial within six months from the date of the arrest . . . If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment."

The government submits that, as noted in its heading, Rule 4 applies to "all cases," and that Rule 6 merely sets forth a time frame for the applicability of Rule 4 in the case of a retrial (compare Rule 6 of the Second Circuit Rules). This Court has never held that the Plan, or the Rules before it, require a trial in any set time.

evidencing the primacy of that interest, the Plan is sufficiently flexible to permit the Government all the time it needs for legitimate purposes. (*See* Rule 5).*

Appellant would have this Court construe Rule 6 of the Plan as an inflexible directive by the Eastern District Judiciary that retrials be actually held within 90 days—or that the case be dismissed, notwithstanding the readiness of the government. Such a rule would be both anomalous and fatally impractical.

The Government respectfully submits that Rule 6 is part of an integrated Plan which has as its goal the elimination of prosecutorial delay. In adopting Rule 6 of the Plan, the United States District Court for the Eastern District has, in effect, directed the United States Attorney's Office to be ready for retrial within 90 days, rather than the 6 months previously mandated by the Second Circuit Rules. Such an interpretation is consistent with the scheme of the Plan—non-dilatory government readiness—and with the predecessor of Rule 6 of the Plan, Rule 6 of the Rules, which specifies the date from which the six month "readiness" period prescribed by Rule 4 shall begin to run in the case of a retrial. Moreover, as an interpretation of Eastern District Rules by an Eastern District Court, the decisions below should be given great weight.**

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* Rule 5 sets forth the "Excluded Periods" which toll the running of the six months period prescribed by Rule 4. This lengthy exclusionary list includes all legitimate periods of time, from that needed for pre-trial motions to that which is needed to actually prepare the government's case, ending with Subdivision (h) which excludes all "other periods of delay occasioned by exceptional circumstances."

** Both Judge Travia and Judge Platt rejected appellant's construction of Rule 6. Each found the Rule to be satisfied by a showing of Government readiness. (See Minutes of May 3, 1974, Government Appendix, 1a; Minutes of May 31, 1974, Government Appendix, 6a).

To construe Rule 6 to mandate dismissal of a case for court congestion is impractical and inconsistent with the public interest which the Rules and the Plan were promulgated to enhance. Whether the 90 day period were construed to run from the order of reversal or the receipt of mandate by the District Court, the condition of today's trial calendars, which are usually scheduled months in advance, would almost invariably preclude a retrial within 90 days. Under such circumstances, a dismissal in face of the prosecution's readiness for trial would, it is submitted, undermine rather than bolster public confidence in our judicial system.

Finally, as noted above, a defendant who is prejudiced by calendar delay is protected by the speedy trial provisions of the constitution. The Courts need not fashion an impractical rule which would, in effect, be merely duplicative.*

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* On two prior appeals before this Court, *United States* v. *Furey*, Docket Number 74-2266, and *United States* v. *Flores*, Docket Number 74-2249, the Government challenged the validity of the Eastern District Plan, adopted pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure, on the grounds: (1) That by adopting Rule 50(b), the Supreme Court never intended to create defenses to criminal offenses (2) That the creation of such defenses by the judiciary would in effect usurp the powers constitutionally vested in the Congress and the President. The Government reiterates this argument on this appeal, and additionally argues that any construction of those rules which would mandate dismissal of a valid indictment in the face of Government readiness for trial would conflict with Article 2, § 3 of the Constitution which places responsibility for execution of laws of the United States in the executive branch. The Government submits that interference with such execution would violate the separation of powers implicit in the Constitution. Since counsel for appellant was also counsel in the *Flores* case, on which this argument was fully briefed, the argument will not be fully set forth herein.

POINT II

The District Court Properly Denied Appellant's Motion to Dismiss for Lack of a Speedy Trial.

The appellant next contends that the length of time between reversal of his prior conviction and his retrial amounts to an impermissible delay in violation of his right to a speedy trial. It is argued that the delay, which was attributable to the Court and not the appellant, was unjustifiable and resulted in "unequivocal" prejudice to the defendant in that he could not locate three of his witnesses at the time of the retrial. The Government respectfully submits that, under the circumstances in evidence here, the appellant's claim of denial of a speedy trial is without merit.

Whether or not a speedy trial has been denied is a relative question which depends upon a weighing of circumstances. *United States* v. *Ewell,* 383 U.S. 116, 120 (1966); *Pollard* v. *United States,* 352 U.S. 354 (1957); *United States* v. *Singleton,* 460 F.2d 1148, 1150 (2d Cir. 1972), *cert. denied,* 410 U.S. 984 (1973). While there is no question that a speedy trial is a "fundamental" right guaranteed by the Sixth Amendment, *Barker* v. *Wingo,* 407 U.S. 514 (1972); *Smith* v. *Hoocy,* 393 U.S. 374 (1969); *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967), the Supreme Court in *Barker* v. *Wingo,* most recently recognized that because of the amorphous quality of this fundamental right, violations thereof are only discernible through application of a "difficult and sensitive balancing process." The factors to be weighed and balanced include: length of delay, the reason for delay, the defendant's assertion of his right, and prejudice of the defendant. 407 U.S. at 530.*

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* With the exception of emphasis, this Circuit had previously adopted the four pronged balancing test. *See eg. United States ex rel. Solomon* v. *Mancusi,* 412 F.2d 88 (2d Cir.), *cert. denied,* 396 U.S. 936 (1969); *United States* v. *Simmons,* 338 F.2d 804, 807 (2d Cir. 1964); *United States ex rel. Von Cseh* v. *Foy,* 313 F.2d 620, 623 (2d Cir. 1963).

With regard to the length of delay, the period in question here is approximately ten months. Appellant's conviction was reversed by this Court on July 5, 1973, though the mandate did not issue until September 14, 1973. On May 31, 1974, when appellant first appeared before Judge Platt, the Court informed him that it was prepared to try the case immediately. To this proposal defense counsel replied that appellant's motion was for a dismissal of the indictment, not for an immediate trial (Minutes of May 31, 1974, Gov't. Appendix, 6a). Any delay thereafter is attributable to defendant.

A delay of ten months is of relatively minor constitutional dimension and should be weighed accordingly.* In *Barker* v. *Wingo*, after eschewing the imposition of defined time limitations in the application of constitutional standards, the Supreme Court rejected a speedy trial claim where the delay between arrest and trial was over five years.** More recently, in *Moore* v. *Arizona*, 414 U.S. 28 (1973) a delay of twenty-eight months was under scrutiny. Finding that the state courts had misapplied the standards set forth in *Barker*, the Court reversed and remanded for reconsideration, without comment on the length of delay. Furthermore, this Court, in a post-*Barker* decision, held that a delay of 21 months from arrest to indictment, when coupled with a delay of 28 months from indictment to trial, was not "extraordinary." *United States* v. *Infanti*, 474 F.2d 522, 527 (2d Cir. 1973).

As noted in *Barker*, length of delay is merely a triggering mechanism. There must be a period of delay which

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* Appellant's reliance upon *Strunk* v. *United States*, 412 U.S. 434 (1973) is misplaced. There, the issue before the Court concerned the remedy for delay; the Court specifically did not review the finding of a denial of a speedy trial (id. at 437).

** A delay of some twenty months occurred after *Barker* expressly raised his speedy trial claim.

is presumptively prejudicial before it is necessary to inquire into the other balancing factors. 407 U.S. at 530. The government submits that under constitutional standards, a delay of ten months was not unreasonable and should not be found to be presumptively prejudicial. Accordingly further inquiry would be unnecessary.

The reason for delay is undisputed. Judge Travia was actively engaged on trial for the entire period and was unable to reach the appellant's case.* There is no suggestion that the prosecution was in any way responsible for this impediment. While recent cases have indicated that calendar delay or other institutional defects are chargeable against the government, see *Barker* v. *Wingo, supra,* 407 U.S. 574, *United States* v. *West,* United States Court of Appeal for the District of Columbia Circuit, Slip Op. Docket No. 73-1665, September 11, 1974; *United States* v. *Fay,* United States Court of Appeals for the First Circuit, Slip Op., Docket Number 74-1235, November 11, 1974,**

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* Appellant's suggestion that the delay cannot be attributed to calendar congestion is unfounded. That Judge Travia was able to reassign a few of his cases does not evidence an ability on the part of other Eastern District Judges to absorb his entire calendar.

** *West* and *Fay* are recent Circuit Court opinions which should be brought to the attention of the Court. While each extends to an unprecedented degree the government's responsibility for delay caused by non-prosecutorial, institutional conditions, each is clearly distinguishable from the instant case.

In *West*, the defendant was incarcerated for 13 months before trial. The case was a simple one, the offense non-violent. Defendant twice demanded a speedy trial during the 13 months delay. The only reason proffered by the Government for the delay was calendar difficulties. When finally tried, the total transcript of testimony was 54 pages. Under the circumstances, the District of Columbia Circuit found the delay unjustified, and charged the government as a whole with the responsibility to insure speedy trials. That the delay was attributed solely to calendar

[Footnote continued on following page]

the *Barker* court made clear that judicial rather than prosecutorial delay is "[a] more neutral reason" which "should be weighed less heavily" against the government. 407 U.S. at 531. Moreover, this Court has had little difficulty in dismissing claims such as appellant's. In *United States* v. *Garelle*, 438 F.2d 366, 369, (2d Cir. 1970), *cert. denied*, 401 U.S. 967 (1971), Judge *Kaufman*, writing for the Court, found the appellant's claim "technical and barren" adding emphatically, "Indeed, the 'delay' was solely attributable to the length of the trial over which Judge Tyler was then presiding." See also, *United States* v. *Infanti, supra*, 474 F.2d at 527, a post-*Barker* case, in which this Court rejected a claim based on calendar congestion in the Southern District, noting "the reason for the delay was neither negligence nor inefficiency on the part of the government."

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congestion, under the circumstances of that case, was held to be of no consequence.

In *Fay*, a delay of nine months was found to have resulted in the loss of a critical witness. A year before the case came to trial defense counsel interviewed the sole defense witness to an undercover narcotics sale. Counsel for the defendant had notes of the interview indicating that the witness would exculpate his client. At the time of trial the witness had disappeared. Though the delay was due wholly to calendar congestion, and counsel had made little effort to maintain contact with the witness, the court charged the government with the prejudice to the defendant as a result of institutional breakdown. It should be noted that the defendant *Fay* had also demanded a speedy trial one month after indictment. The Court held that as a result of the critical nature of the missing witness and the unavailability of the testimony, the defendant had been prejudiced.

In the instant case, appellant Drummond made no demand for a speedy trial at any time during the applicable period of delay. He was not incarcerated during the delay, nor did he suffer the loss of testimony of a critical witness—appellant had available to him all the testimony of the missing witnesses. Even if the Court should find the government chargeable with the calendar congestion which caused the delay in the instant case, there is not here present the other balancing factors which would justify resort to "the unsatisfactorily severe remedy of dismissal of the indictment" *Barker* v. *Wingo*, 407 U.S. at 522.

The appellant's claim of "unequivocal" prejudice is similarly inflated. It is alleged that as a result of the Court's delay, appellant was prejudiced when he lost contact with three witnesses who had testified at his first two trials. Attributing this loss of contact to the Court, appellant argues that he was thereby denied an opportunity to have the jury evaluate his witnesses' credibility based upon observations of demeanor, behavior and appearance.

As Judge Platt noted in denying appellant's motion to dismiss, the obligation to maintain contact with defense witnesses rested with the appellant, not the Government. Appellant was not incarcerated; and the witnesses with whom he allegedly lost contact were his personal friends. Appellant was therefore in a far better position to keep track of them than was the government. Moreover, there is no evidence in the record that loss of contact was the result of the "delay" in retrial. Though given the opportunity (Minutes of July 11, 1974, Gov't. Appendix, 21a), appellant produced no evidence as to when his witnesses became "unavailable". They may well have moved from their former addresses before the reversal of appellant's prior conviction. *Cf. United States* v. *Infanti, supra,* 494 F.2d at 528.

Nor has appellant shown sufficient prejudice to require reversal. Two of the three missing witnesses, Annette Days and Rose Garner, added little to appellant's case, merely corroborating facts which were not materially in issue. James Clark, who did corroborate appellant's story with regard to his dice game winnings, was, according to appellant's own testimony, one of fifteen or twenty people from whom he won money on February 10, 1972 (308). He further testified that he played craps at the after hours club regularly and knew the people with whom he played (305-308). Yet he made no effort to produce at trial any of the fifteen to twenty people who could testify as to his winnings, preferring instead to rely on the absence of one man, James Clark, in order to claim prejudice.

Finally, with regard to his claim of prejudice, appellant was not without remedy for his loss of defense witnesses. He was permitted by the Court to read into evidence their testimony from his two prior trials, at which he had the opportunity to question them fully. The availability of their sworn testimony surely minimizes any prejudice appellant might have suffered. *See United States* v. *Singleton, supra*, 460 F.2d 1148, 1152-1153, wherein this Court sanctioned the use of the deposition of a seriously ill prosecution witness over the objection of defendant who claimed that the witness' illness was due to the government's delay and that he was denied his right to confrontation by use of the disposition.

Lastly, and most importantly, appellant never pressed his right to a speedy trial. Represented by counsel at all times, appellant never once, during the period between the July 5, 1973 reversal and April 12, 1974 calendar call initiated by the Court, moved for or demanded a speedy trial. Appellant's motion to dismiss, dated April 16, 1974 and argued May 3, 1974, was predicated solely upon Rule 6 of the Plan. It was not until May 31, 1974, before Judge Platt, that appellant's counsel moved to dismiss for lack of a speedy trial, at the same time indicating that the appellant did not at that point desire a speedy trial (see Minutes of May 31, 1974, Gov't. Appendix, 6a). While the failure to demand a speedy trial is not an automatic waiver of this "fundamental" right, *Barker* v. *Wingo, supra*, 407 U.S. at 525-527, such failure weighs heavily against the defendant in the "delicate" balancing of circumstances (id. 528-529).

The Government respectfully submits that a balancing of the circumstances evidenced by the facts in this record supports the District Court's findings that appellant was

not denied his right to a speedy trial. Applying the "'flexible' standards based upon practical considerations" prescribed by *Barker*, see *Strunk* v. *United States*, *supra*, 412 U.S. at 438, the judgment of the District Court should be affirmed.

POINT III

The District Court Properly Admitted Evidence of the Prior February 3rd Heroin Transaction.

Appellant finally argues that the District Court committed prejudicial error when it admitted evidence of the February 3rd heroin transaction.* Citing *United States* v. *Falley*, 489 F.2d 33 (2d Cir. 1973), appellant contends that the absence of *direct* evidence that he participated in the February 3rd transaction precluded use of such evidence in his trial for conspiracy to distribute heroin on February 10th, a week later. Appellant's argument lacks merit.

The record contains ample evidence from which the jury could infer that Dennis Drummond participated in the heroin conspiracy on both February 10th and February 3rd. The conspiratorial method of operation was the same on each occasion. Agent Bernhardt was admitted to 210 Cornelia Street where he and Days waited in the lower level living room while a third person went to pick up and deliver the drugs. The evidence established that on February 10th, after telling the agent "the man" was present and was going to get the drugs, Days took out the same money box which he had used during the drug transaction on February 3rd, and, handing a sum of

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* It should be noted that this same evidence was admitted with the identical limiting instruction at both of appellant's prior trials before Chief Judge Mishler. Appellant did not raise this issue on appeal from his earlier conviction.

currency to Drummond, told him to get the heroin. Drummond then left 210 Cornelia Street and, entering his brown Toronado, drove off. Since the same method of operation was used by the conspirators on February 3rd, and appellant's car was observed leaving the premises at the time of the February 3rd transaction, the jury had before it sufficient circumstantial evidence to find, beyond a reasonable doubt, that appellant participated in the conspiracy on that evening.*

Since there was sufficient evidence from which the jury could find the appellant participated in the conspiracy to distribute heroin on February 3rd, such evidence was properly admitted to prove the motive and intent for appellant's actions one week later on February 10th. Moreover, the February 3rd evidence was relevant to negate appellant's defense, which, having been set forth in two prior trials, the Government could reasonably anticipate. *See United States* v. *Purin*, 486 F.2d 1363, 1367 (2d Cir. 1973), *cert. denied*, — U.S. —, 94 S. Ct. 2640 (1974); *United States* v. *Wright*, 466 F.2d 1256, 1258 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967).**

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* The jury might additionally have found that appellant's denial of ownership and use of the Oldsmobile on February 3rd was a false exculpatory statement evidencing a consciousness of guilt.

** *See also, United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973), in which this Court held that it was proper for the Government in a bank robbery trial to prove appellant's participation in a prior uncharged bank robbery in order to show the organization and structure of the larger conspiracy, and to prove appellant was not merely an innocent participant in the bank robbery for which he was tried; and, similarly, *United States* v. *Stadter*, 336 F.2d 326 (2d Cir. 1964), *cert. denied*, 380 U.S. 945 (1965).

The District Court properly instructed the jury as to the limited use of the February 3rd evidence. Prior to admission of any evidence with regard to February 3rd transaction, Judge Platt gave the jury the following limiting instruction:

> This witness is going to testify with respect to certain events that occurred on February 3rd and he is also going to identify certain substances which it is stipulated, as I understand it, is heroin.
>
> The stipulated heroin related to the February 3rd events that he is going to testify to, and it is as to that heroin that I am going to give you this limiting instruction: That transaction on February 3rd is unrelated to the transaction of February 10, 1972. However the Government's theory is, and the reason that it is permitted at all, is because the Government claims it is similar to the transaction of February 10, 1972.
>
> Now, you must keep your eye on the ball. The charge is that on February 10, 1972, this defendant and one Donald Days knowingly and wilfully conspire to possess and distribute approximately one to five [sic] grams of heroin.
>
> The mere fact that it is a similar type of transaction will not serve as proof in the charge before you except to this extent:
>
> If the Government proves beyond a reasonable doubt that Donald Days and Dennis Drummond on February 3, 1972, entered into this same or similar type of deal with the undercover agent, then it may, and that determine will be left to you, bear on whether this defendant knowingly and wilfully entered into a transaction on February 10, 1972, to sell one to five [sic] grams of heroin.

> The Government must prove the conspiracy existed on that date, February 3, 1972, before you can determine whether to use it on the charge before you which concerns February 10, 1972.
>
> Bear that in mind with respect to any testimony that is offered as to February 3, 1972 (30-31).

Thereafter, in charging the jury at the end of the trial, Judge Platt again delimited the available use to which such evidence could be put, reading the standard charge set forth in Devitt and Blackmar, Federal Jury Practice and Instructions, § 13.07,:

> The fact that the accused may have committed an offense at some time is not any evidence or proof whatever that, at a later time, the accused committed the offense charged in the indictment, even though both offenses are of a like nature. Evidence as to an alleged earlier offense of a like nature may not therefore, be considered by the jury, in determining whether the accused did the act charged in the indictment. Nor may such evidence be considered for any other purpose whatever, unless the jury first find the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the act charged in the indictment.
>
> If the jury should find beyond a reasonable doubt from the other evidence in the case that the accused did the act charged in the indictment, then the jury may consider evidence as to an alleged earlier offense of a like nature, in determining the state of mind or intent with which the accused did the act charged in the indictment. And where all the elements of an alleged earlier offense of a like nature are established by evidence which is clear and conclusive, the jury may, but is not obliged to, draw the inference and find that in doing the act charged

in the indictment, the accused acted wilfully and with specific intent, and not because of mistake or accident or other innocent reason 467-468).

The Government respectfully submits that the District Court's instructions with regard to evidence of the February 3rd transaction were clear and unambiguous; and that evidence itself was competent and relevant to the issue on trial—whether the appellant knowingly and wilfully conspired to distribute heroin on or about February 10, 1972.

Appellant's reliance on *United States* v. *Falley, supra,* 489 F.2d 33, is misplaced. Unlike the instant case, evidence complained of in *Falley* concerned a narcotics transaction which concededly was unrelated to the appellant therein. Here, the jury was instructed that the prior similar narcotics transaction could only be considered if the jury first found, beyond a reasonable doubt, that the appellant was part of the earlier conspiracy (30-31) (See also Gov't Summation, p. 441).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: December 23, 1974

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
PAUL F. CORCORAN,
Assistant United States Attorneys,
Of Counsel.

APPENDIX

Transcript of Proceedings for May 3, 1974

(1)

United States District Court

EASTERN DISTRICT OF NEW YORK

72 CR 650

UNITED STATES OF AMERICA,

—against—

DENNIS DRUMMOND,

Defendant.

United States Courthouse
Brooklyn, New York
May 3, 1974
10:00 a.m.

Before: HONORABLE ANTHONY J. TRAVIA, *U.S.D.J.*

SHELDON SILVERMAN
Acting Official Court Reporter

(2)

APPEARANCES:

EDWARD J. BOYD V, ESQ.
United States Attorney
for the Eastern District of New York

By: ETHAN LEVIN-EPSTEIN, ESQ.
Assistant United States Attorney

MS. MARION SELTZER, ESQ.
Legal Aid Society
Attorney for Defendant

Excerpts Dated May 3, 1974

(3)

The Clerk: United States of America vs. Dennis Drummond.

The Court: On the motion first.

Ms. Seltzer: Your Honor, this is a motion under Rule 6 of the Second Circuit rules regarding prompt disposition of cases. It's the defendant's contention this case ought to be dismissed.

My understanding is that the case was reversed and remanded on July 5, 1973, for a new trial. Between that time and, I believe, late April or early May of 1974, no action was taken on the case. It is our position that it's the Government's responsibility to make sure that the case is at least tried or marked ready within 90 days from the time of the rehearsal.

The Court: It's my case assigned to my calendar?

Ms. Seltzer: Assigned to your calendar.

The Court: What do you do from the period of at least October 1st, '73 to now, of which I've been on trial, as you know, on one case? It's not over yet.

Ms. Seltzer: The Government has, at least, responsibility to put the case on for trial, on the calendar, and is declaring its readiness for trial. I understand you didn't start your case until October.

The Court: October 1, right.

Ms. Seltzer: So that between—

(4)

The Court: Between October 1st and the date when it was reversed, how many days is that?

Ms. Seltzer: Almost three months, your Honor.

The Court: When was it returned to us?

Ms. Seltzer: Returned, I understand, in September, your Honor. My understanding—

The Court: In September, right?

Ms. Seltzer: Right.

Excerpts Dated May 3, 1974

The Court: September 19th, less than a month before I started the case and I might say during the month of September we disposed of many pre-trial motions on that case to prepare for trial.

If the case had been called—I don't know if it was called.

Ms. Seltzer: Never called, your Honor.

The Court: That's all right. That would be my fault, wouldn't it?

Ms. Seltzer: Your Honor, it's my contention—my understanding, according to the way you've been conducting your procedures, you have been hearing motions—

The Court: Every Friday.

Ms. Seltzer: And 4:30 during the week. There's no reason why the Government could not have the case put on the calendar and then, if necessary, have it (5) transferred to another judge. They made no effort.

The Court: Do you want to try the case?

Ms. Seltzer: It's going to have to be tried if it's not dismissed.

The Court: Any time you want it tried, I'll prepare for another judge to take it. I'll refer it to Judge Platt who will be coming in this month. He'll give you a fast trial.

I don't know if I'll be finished with my case. On this motion, Mr. Epstein, do you want to say anything?

First, have you completed your argument?

Ms. Seltzer: Yes, your Honor.

Mr. Levin-Epstein: I'd only reiterate what your Honor has already pointed out that in fact the case, although remanded, ordered remanded on July 5th, of 1973, was not actually transferred physically from the Second Circuit Court of Appeals to the District Court Clerk until September the 19th of 1973.

Considering the logistics of placing the case ready for trial by yourself on your calendar, between the period of

September 19th and October 1st, I believe that is certainly considered a reasonable period of time for your calendar to be placed in order; that especially in light of Rule 9 of the Second Circuit (6) rules which states in our affidavit in opposition, I quote: "The Court has sole responsibility for studying and calling cases for trial."

The Government reads that phrase, "sole responsibility," to mean just that; that it is not the Government's responsibility to expedite cases in this posture, but rather the Court's responsibility and respectfully, your Honor, if within your discretion, you did not put it on for trial; that's the position.

Ms. Seltzer: Doesn't the Government have at least the responsibility to file a notice of readiness, your Honor, which they did not do?

Mr. Levin-Epstein: My understanding of the notice of readiness and it serves when a case is new and it's an indictment or information, that the Government is required within six months in non-incarcerated cases to show they were ready to proceed to trial. It should be implicit if not explicit from the record th Government has not only been ready to try this case, but has tried it twice.

I don't feel it's the constraints of the rules, are such that we have to file a third notice of readiness in order to show the defendant that in fact the Government is prepared to try the case again. The evidence which would be adduced at the third trial, (7) I think, is fair to state at this point, would not be so new or so innovative with respect to the facts the defense would have to be put on any greater notice than put on twice before.

Respectfully, the Government submits the motion should be denied on that basis.

The Court: If there ever was a case where I welcome the scrutiny of the Court of Appeals, it's this one. If they can tell me how I could have tried this case, I welcome their suggestion.

Excerpts Dated May 3, 1974

As far as I am concerned, the motion is denied and I shall, in view of my continued engagement at trial, I will refer this case to Judge Platt with a note, together, and set a trial date for his part as soon as practical for him.

Motion denied.

Mr. Levin-Epstein: Adjourned without date, your Honor?

The Court: I'm going to refer it today to Judge Platt and I would suggest as soon as Judge Platt begins service here, which is within the next week, you call him and set it. Have it set on the calendar for call for all purposes and to set a trial date.

Mr. Levin-Epstein: Very well.

The Court: That would be my note to him.

* * * * *

Transcript of Proceedings for May 31, 1974

(1)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

72 CR 650

UNITED STATES OF AMERICA,

—against—

DENNIS DRUMMOND,

Defendant.

United States Courthouse
Brooklyn, New York
May 31, 1974
10:00 o'clock A.M.

Before: HONORABLE THOMAS C. PLATT, *U.S.D.J.*
ILENE GINSBERG
Acting Official Court Reporter

(2)

APPEARANCES:

DAVID G. TRAGER, ESQ.,
United States Attorney
for the Eastern District of New York

By: PAUL CORCORAN, ESQ.,
Assistant United States Attorney

Legal Aid Society

By: MS. MARION SELTZER, ESQ.,
For the Defendant

Excerpts Dated May 31, 1974

(3)

The Clerk: Criminal Cause pre-trial conference, U.S.A. v. Dennis Drummond.

Ms. Seltzer: Your Honor, there was—My understanding is that the ruling of the Court of Appeals said they thought the motion was untimely.

The Court: I am prepared to give you as prompt a trial as I can.

I am going to be in Washington next week, and then on June 10, I have one other jail case, U.S. v. Shepeard. If they are ready, I have to go with that case, and you are second. If they are not ready on the 10th, I will take you.

Ms. Seltzer: I would ask we be allowed to re-open the motion to dismiss.

Apparently, there are new circumstances that have arisen, and therefore I think it would be appropriate to re-open it.

When the motion was argued, I argued strictly on the ground that it had been more than ninety days—a lot more —between time of the discussion, and the time the case was put on the calendar.

Meanwhile, I am attempting to put the case together for trial, and I think that witnesses are not available, and I think it is due directly to the failure to put the case on the calendar, and I feel Mr. Drummond will be (4) prejudiced.

There was no mistrial, and there are situations that can create a reasonable doubt in the mind of a juror.

My Investigator is here now. We are trying to get these people.

The Court: If you are going to make a motion, you will delay the trial further. You may make a motion. I can't stop you from doing that.

The earliest date I will hear your motion is June 14, and

you will want it on papers if you follow the same routine as before.

There is no point in making it orally, because you cannot mandamus me back to the Court of Appeals unless it is on papers.

Ms. Seltzer: It is my understanding that the Court of Appeals feels they don't want to rule on motions as to the speedy trial rule until after trial.

The Court: Well, you will have to put in papers, and set forth the facts which you think warrant the situation, and the United States Attorney must reply, and I am prepared to proceed June 10, and you are going to take it out of that date.

Ms. Seltzer: I don't have my witnesses, Judge. I had them last summer.

(5)

The Court: You have asked for an immediate trial, and you have asked for it in the Court of Appeals.

Ms. Seltzer: No. We felt that under Rule 6 of the Speedy Trial Rules—

The Court: It is the failure to prosecute after a hung jury within ninety days, and you were before Judge Travia —who has been on trial for I don't know how many months —when you made a motion for a trial then, and he assigned it to me.

Ms. Seltzer: That's not what happened.

If you will excuse me, the circumstances were this: The Court of Appeals decision that reversed the Drummond case came down last July.

The case was never put on the calendar between last July—and this man—and when it was put on in May, that was the ground on which we moved to dismiss.

The first issue is, whose responsibility is it to make sure

the case is put on the calendar? Is the defendant supposed to run down to the Clerk's Office and have the case put on the calendar? It was never put on.

The Court: As I understand it, the Government had been ready—

Mr. Seltzer: The Government never appeared in court.

Mr. Corcoran: We have no obligation to move to (6) put the case on the calendar.

Judge Travia was not able to calendar it, and the defendant made no motion for speedy trial before this was brought up in May.

Had you moved earlier, perhaps it would have been transferred at an earlier time.

The Court: As I understand it, the Government is ready.

You know, if a defendant wants an immediate trial, he or she comes in and asks for it. I am prepared to do that.

Ms. Seltzer: The motion was not for an immediate trial, but to dismiss.

The Court: And that was denied by Judge Travia, and the Court of Appeals has at least acquiesced to Judge Travia's decision.

Ms. Seltzer: They haven't ruled on it, but I feel Judge Travia's decision is moot because of the prejudice.

The Court: Were the facts true when you made the motion before Judge Travia? Were the witnesses gone?

Ms. Seltzer: I wasn't aware of it. I wasn't the original trial lawyer. Barry Krinsky was the original lawyer, and he is no longer with my office.

(7)

The case, between the time of the Court of Appeals decision last July, and between this May, was in a state of limbo because it was not on anybody's calendar.

The Court: You are aware, that Judge Travia has been on trial since last fall.

Excerpts Dated May 31, 1974

Ms. Seltzer: Yes.

Your Honor, we were never in court, and when it was finally calendered in May, I was assigned to represent Mr. Drummond, and since that time, less than a month ago, I have been making every effort to put together a trial, and now I find my witnesses no longer exist.

The Court: Are they dead or just not available?

Ms. Seltzer: I don't know where they are. I have a full-time Investigator making every effort to find them, and Mr. Drummond is trying to assist us.

The Court: I cannot advise you what to do, but I am putting it down for Monday, June 10, or right after the jail case.

Ms. Seltzer: I will make the motion. I will prefer to do that and have you rule on the motion.

The Court: Make the motion returnable no later than the 14th of June.

Mr. Corcoran: Can you put the case down for the 14th of June?

The Court: You don't want me to put it down for (8) the 10th?

Ms. Seltzer: I would prefer to have my motion made. It is a good motion.

The Court: Will your motion be ready the morning of the 10th?

Ms. Seltzer: It can be ready, but the point is that Mr. Drummond is not being prejudiced between the 10th and 14th in the sense that he is not sitting in jail.

The Court: All right. The 14th.

When can you have the motion papers in?

Ms. Seltzer: By Monday or Tuesday.

The Court: You are only going to give him two days to reply? Is that Monday or Tuesday of next week?

Ms. Seltzer: I can have them in—submit them—

The Court: June 4.

Excerpts Dated May 31, 1974

In other words, you will have them served by June 4.

Ms. Seltzer: Yes.

The Court: Reply by the 11th.

Ms. Seltzer: We are not scheduled for trial on the 10th?

The Court: No. You are going to have June 4 for the papers, and June 11 for reply. I will have all the papers, and we will have argument on the 14th.

Ms. Seltzer: Can we put it down for the 14th?

(8a)

The Court: Yes. We will do that. We will put it down for June 14, but you might lose your priority on the calendar.

Ms. Seltzer: Your Honor, I cannot blame the delay on your Honor, but on the calendar for the last nine months.

* * * * *

Transcript of Proceedings for June 21, 1974

(1)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

72 CR 650

UNITED STATES OF AMERICA,

—against—

DENNIS DRUMMOND,

Defendant.

United States Courthouse
Brooklyn, New York
June 21, 1974

Before: HONORABLE THOMAS C. PLATT, *U.S.D.J.*
MICHAEL J. MIELE
Official Court Reporter

(2)

APPEARANCES:

DAVID G. TRAGER, ESQ.,
United States Attorney
for the Eastern District of New York

By: PAUL CORCORAN, ESQ.,
Assistant United States Attorney

MARION SELTZER, ESQ.
Attorney for Defendant.

Excerpts Dated June 21, 1974

(3)

The Court: I might as well tell you right now, Ms. Seltzer, you have this case that I am concerned with and that is the Drummond case and I have got two days at the beginning of next week and then I have an income tax evasion case and it is an old case that the Government has been ready in and has all its witnesses lined up and Mr. Pattison tells me it is going to take two to three weeks.

Ms. Seltzer: My position on Drummond is that all our witnesses are missing.

The Court: There is no reason why you can't read any testimony in the prior trial.

Ms. Seltzer: The problem is cross-examination.

The Court: I sympathize with your situation, Ms. Seltzer. Nevertheless, you have had two prior trials in this case and there is testimony of at least some of the people you want as witnesses in the prior trials and there is no reason why you cannot read that testimony.

Ms. Seltzer: The problem resulted, as I have indicated that one of the principal reasons why the Second Circuit reversed was the impropriety in much of the cross-examination by the United States Attorney, and I think it would be extremely prejudicial, as the (4) Second Circuit believed it was, to read that into evidence.

The Court: If you have particular objections to the testimony that is being read you can object at that point in the cross-examination and I will rule on it.

Ms. Seltzer: In addition, I feel in any event a defendant is being prejudiced by the defendant not being able to have witnesses appear in court where the jury can evaluate them.

The Court: I understand, but it is not the prosecution's job to safeguard the witnesses of the defendants.

That is the defendant's job. This defendant is not incarcerated and he is free and if he cannot keep track of his

witnesses that is not either the Court's or the prosecution's fault.

Ms. Seltzer: If the trial had been held some six or eight or nine months ago there is a good possibility that those witnesses would have been here, but when you have a lapse of over two years from the time that the original indictment was handed down and the third trial, and a lot of that delay is because of no lack of diligence on behalf of the defendant, I think it is impossible for him to have a fair trial and the Constitution mandates that he be given a fair and (5) impartial trial, and as well as the Second Circuit ruling that he get a speedy trial—

The Court: He has had two trials and unfortunately none of them have stuck. We will give him his fair and speedy trial. I offered you a trial on Monday and you said Monday doesn't mean that much to you.

Ms. Seltzer: No, we don't have any witnesses. It wasn't Mr. Drummond's fault that Mr. Stechel created such reversible error last year that the Second Circuit was compelled to reverse.

The Court: I understand, but he has to keep track of his witnesses. It is not the prosecution's job.

Ms. Seltzer: There is a limit as to what kind of demand can be made on a defendant. He cannot tie them down.

The Court: I don't think that is an unreasonable demand when a man's liberty is at stake to keep track of his witnesses.

Ms. Seltzer: I think I indicated in my motion paper and memorandum that I addened to that that Mr. Drummond was under the impression for the last six or seven months that the Government was seriously contemplating dismissing this action. Under the circumstances where the Second Circuit came down with a (6) decision on July 5th last, and the Government for a period of eight months makes no effort at all to, in any way, prosecute or put the

case on the calendar, I think it was fair for him to believe they were seriously contemplating a dismissal.

The Court: I find it very difficult to understand how the Government was going to dismiss as against him when the Government had obtained a conviction in the last trial.

Ms. Seltzer: There were two trials, a mistrial in one case.

The Court: I am going to deny your motion and we will put it in the ready and pass status and call it ready and pass on twenty-four hours notice in the event something happens to this income tax evasion case and we will call it again on July 12th.

Ms. Seltzer: I would ask leave to submit further papers as to our position on the admissibility of prior testimony.

The Court: You don't have to read the testimony. You can read as much of it as you want or not read it or just rely on the defendant's testimony.

I am not compelling you to read the testimony.

Ms. Seltzer: That is taking away three-quarters of his defense.

(7)

The Court: You have the option of reading that testimony or not. If you object to certain portions of the cross-examination you can do so during the trial and I will rule on it.

Ms. Seltzer: At this time I object to your ruling but if we are going to be forced to try this case and if the only alternative we have is to use the prior record, I think perhaps it would be appropriate for me and Mr. Corcoran, sir, to sit down and see what we can do about the cross-examination.

The Court: I have no objection to that. I think that would be very constructive.

Excerpts Dated June 21, 1974

Mr. Corcoran: I have another trial on July 15th and there might be some problem.

The Court: Well, let's see how it looks on July 12th.

Mr. Corcoran: One of the witnesses that Miss Seltzer claims she cannot find, Mrs. Garner, was not called at the last trial.

Apparently she is not a necessary witness and I would object to reading any objection to the last trial since that trial was a nullity and the order for the retrial is the second trial—

The Court: Oh, no. If this is a missing witness and she testified and she has been subject to (7a) cross-examination I would think in all fairness you ought to let her read it. I will take it up at the time of the trial when we cross that bridge.

I don't see how you can foreclose that.

* * * * *

Transcript of Proceedings for July 11, 1974

(1)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

DENNIS DRUMMOND,

Defendant.

United States Courthouse
Brooklyn, New York
July 11, 1974
10 a.m.

Before: HONORABLE THOMAS C. PLATT, *U.S.D.J.*
HENRI LEGENDRE
Court Reporter

(2)

APPEARANCES:

DAVID G. TRAGER, ESQ.,
United States Attorney
for the Eastern District of New York

By: PAUL CORCORAN, ESQ.,
Assistant United States Attorney

MARION SELTZER, ESQ.
Attorney for Defendant

Excerpts Dated July 11, 1974

(3)

The Clerk: Miss Seltzer, are you ready?

Ms. Seltzer: Yes, your Honor.

Mr. Corcoran: We discussed earlier that previous meeting, apparently defense counsel has some problem producing witnesses. She had gone through testimony at the prior trial and gave me a copy of the proper deletion of cross-examination, three witnesses that she would like to read into the record at this trial. Two of the witnesses I have no objection to, Mrs. Anny Days and Mrs. Rose Gardner, very brief testimony. She would like to read it.

As far as the testimony of James Clark, the defense counsel says she is unable to find.

The Court: What page is that?

Mr. Corcoran: 193 to 238-A, second trial, November 1, 1972.

The Court: I have the testimony on page 193. You object to the entire testimony?

Mr. Corcoran: Ms. Seltzer has given me a copy which we omit 30 of 36 pages of cross-examination.

The Court: What pages do you wish to omit?

Ms. Seltzer: The cross-examination of Mrs. Steckel of Mr. Clark during both trials, but during the second trial was exceptionally inflammatory and exceptionally improper and, for that reason, I (4) would request that a good part of that cross-examination be deleted upon a rereading.

The Court: What page is this?

Mr. Corcoran: Virtually the—

Ms. Seltzer: There was questions where he was asking about—

The Court: I have the bracketed part omitted.

Mr. Corcoran: She also was attempting to edit it.

Ms. Seltzer: Your Honor, there were certain—

The Court: There is no way that I can make a deter-

mination until I read the whole thing. You are not going to get to this today. We are not going to sit tomorrow. We'll resume on Monday. You will have about an hour of trial. My friends loaded me up with 50 cases on Friday, motions and pre-trial.

Ms. Seltzer: We would have no objection to wait until Monday.

The Court: I would be glad to get the jury in for you, Ms. Seltzer, if you would like to have it.

Ms. Seltzer: Thank you very much.

The Court: I will read it and I will make a determination. If the Court of Appeals passed on this testimony—

Ms Seltzer: They made a few references that (5) they thought was—

The Court: Did they make any reference to this testimony in particular?

Ms. Seltzer: Not in particular that I recall, but generalizations that would apply to this testimony.

The Court: I have the Court of Appeal's decision and I tried to get to it last night. I think they said in their opinion we don't find it necessary to point out every particular instance of misconduct by Mr. Stechel, but reading the record as a whole, that they found it prejudicial and improper. Let me read—to do it properly I will have to read direct examination—you blocked up part of his direct examination, too.

Ms. Seltzer: It was my feeling when I was going through the testimony that the whole procedure of rereading testimony is in itself very confusing to a jury, which is why it is my opinion that this entire trial is prejudicial and improper.

I would renew my previous motion to dismiss on the grounds of Rule 6 of the Second Circuit rules, and also on the ground that it is impossible for Mr. Drummond to have a fair trial because of the delay and because that has resulted in the absence of most of the witnesses.

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(6)

Mr. Corcoran: I would like to say for the record at this time, as we stated earlier, the U.S. Attorney's office accepts no blame for any delay, no prosecutoria delay and we are not responsible for producing defense witnesses. We stipulated to read his testimony in the record. Since Ms. Seltzer made a good faith effort to get these people and they are not available, I have been trying to find Mr. Clark and not been able to. The stipulation is in no way an admission that the U.S. Attorney's office was responsible for the delay in the trial.

The Court: Well, as I understand it, Mr. Corcoran, your position is correct, the U.S. Attorney's office is not responsible. The reason for the delay, and I think Ms. Seltzer knows, that Judge Travia was involved in a trial for nine months that ended last week, and that was the reason for the delay of this case. It was Judge Travia's case. When it was assigned to me in May I had two or three jail cases ahead of it that I felt I had to try since these individuals had been in jail for some substantial period of time.

Prior to the trial of the Berliner case that I am just finishing, the jury is out, I asked Ms. Seltzer if she wished to go ahead and she said she was in no (7) rush. I said we will take it after the income tax case, the Berliner case. I can't see how the delay could have been avoided here.

Ms. Seltzer: When I made that statement I by no means meant that we were withdrawing our previous motion or argument as to the prejudice. When I said at this point it would make a difference if we tried it two weeks earlier or later, it was my feeling a delay of eight months, putting it on a calendar, related in such substantial prejudice, an additional two weeks wouldn't make a difference.

The Court: Some two weeks ago you said to me, I recall your statement to me, if anything, you could use the two weeks to try and find some of these witnesses.

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Ms. Seltzer: But I did not mean to waive any motions or any rights that we had or had previously made.

The Court: I understand that. And I understood that at the time, and I felt you might—but two weeks have come and gone, you haven't found the witnesses so I think we have to proceed.

Mr. Corcoran: There had been no showing by defense counsel that any of the witnesses that are now unavailable would have been available had this (8) case been retried seven or eight months ago. In fact, one of the witnesses whose testimony she proposes to read in the record, Mrs. Rose Gardner was not available at the time of the second trial.

Ms. Seltzer: The statement was that she had been in a car accident, and that's why she was not available to testify. She was in New York and we were able to locate her.

Mr. Corcoran: There has been no showing at which point these witnesses became unavailable.

Ms. Seltzer: In the affidavit I submitted, we made approximate estimates when they left New York. They didn't check in and out of my office when they left New York.

The Court: In any event, there is nothing that I can see that this Court could have done about it during the intervening period. I don't see there is any prosecutorial delay or other conduct that would in any way lead this Court to grant your motion, so your motion is denied and we will proceed.

Ms. Seltzer: In reference to the transcript of the testimony of James Clark, it seems to me that if in fact we are going to have to use this procedure of rereading prior testimony into the record, the procedure is difficult enough for a jury to understand (9) what is being said when it's being read. It's an entirely different situation when a witness is before them and the emphasis is different and the gesture is different. The whole inclination of the

testimony is different and it is also, it appeared to me, when I reread the record, certain parts of the transcript used words which may have sounded like those that the witness used but may not have been actually correct words.

The Court: I'll read Mr. Clark's testimony and if there is anything that you can't agreed on with Mr. Corcoran, I'll see whether your editing is proper.

I would suggest that you try to agree with Mr. Corcoran as to what the editing portion, what you can agree on, if anything.

Ms. Seltzer: He objects to my procedure of editing or even correcting grammer that might have been improper.

The Court: I can't blame him. I misspeak myself all the time, I hate to look at the record.

Ms. Seltzer: But the problem is in rereading his testimony I would think the purpose is that this jury understands what was said.

The Court: Don't point to the jury. It's just a bunch of vacant chairs.

(10)

Ms. Seltzer: And there is nothing served to anyone by just confusing them.

The Court: Let me read it. If I agree with you that there was certain editing that should have been done, I may say so, otherwise I'll stick with the record.

Ms. Seltzer: Just as far as the cross-examination, I just edited—there was a lot of cross-examination, it was totally irrelevant and confusing and that served nothing—

The Court: I'll make that determination and I'm very liberal on cross-examination, as attorneys may have already told you.

In any event, I'll read it. I'll certainly read it during this weekend, so you can read it on Monday.

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Do we have anything else? Any other piece of housekeeping?

Ms. Seltzer: The original trial, there was a motion to suppress, particularly to suppress the money that was seized from Mr. Drummond's pocket. I would again re-new that motion.

The Court: There was money when he was arrested. And the motion was denied by Judge Mishler. You want me to overrule Judge Mishler?

(11)

Ms. Seltzer: I would like to renew that motion.

The Court: Your motion is denied.

Ms. Seltzer: At least preserve it for the record. I am wondering as to what procedures we are to follow, if for some reason I should lose this case and it should go up for appeal again, if it's—how do you want me to proceed in renewing every motion or every objection that was made in the original two trials, because I would like to preserve all the objections and motions that were made at that time?

The Court: I think you should.

Ms. Seltzer: Would you like me to repeat each one as we go along?

The Court: Make all the motions you made in the trial prior to or during the course of the last trial—for no other reason, Ms. Seltzer, so you won't have to stand up to two records.

Ms. Seltzer: I know they reviewed both of the other two records at the time when they issued their last order.

The Court: Make all your motions in the course of this trial.

Did you want to say something?

Mr. Corcoran: The Court of Appeals did pass upon the admission of the cash seized upon the (12) defendant's person, saying it's no problem.

Ms. Seltzer: It's our understanding that they did not

pass on it one way or the other. They didn't sign it one way or the other. Their wording can be interpreted in two ways. Because of the prosecutorial misconduct the issue was not reached.

Mr. Corcoran: We have no difficulty dismissing both points in reference to that.

Ms. Seltzer: Our position is that they did not decide upon those issues.

The Court: Any way, I have denied it.

Ms. Seltzer: In addition, I have had some discussions with Mr. Corcoran about the use of the heroin that was presented in the last case. I don't know if you are familiar with the circumstances of the trial, but apparently there was an undercover sale that occurred a week prior to the undercover sale for which Mr. Drummond is supposedly a co-conspirator, and there was an amount of heroin that was purchased from Mrs. Days. The last time there was a chemist who testified as to the chemical content of that heroin, and I believe it was shown to Detective Bernhart for no particular reason but to identify it. I agreed to stipulate to the chemist's testimony, and I would request first—I would renew the previous motion that (13) was made, to prohibit any testimony of the February 3rd transaction to come into evidence, as it's irrelevant to this conspiracy. This conspiracy is a conspiracy which deals only with the events of February 10th, but if you deny that motion, then I would request that it is not necessary to bring the heroin into the courtroom and to start bandying it around to the jury. This is heroin that was involved a week earlier, it's actual presence is not necessary in a trial of this kind except to inflame the jury and prejudice the defendant.

Mr. Corcoran: If I may be heard, your Honor.

The Court: This motion I take it was also denied?

Mr. Corcoran: Yes, it was.

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Ms. Seltzer: But they had a chemist here and the chemist had it and said this is the stuff I analyzed.

Mr. Corcoran: Ms. Seltzer agreed to stipulate to the chemist's testimony.

Ms. Seltzer: I'll stipulate to the chemist's testimony.

The Court: The charge here is conspiracy to possess this heroin.

Ms. Seltzer: The heroin they have is not the heroin that Mr.—

(14)

Mr. Corcoran: Judge Mishler allowed the introduction of the heroin and the testimony of the February 3rd transaction as a prior similar act. If the jury inferred that Mr. Drummond was involved on February 3rd, they might infer also that his motive and intention was the same on February 10th. The testimony will be on February 3rd Detective Bernhart purchased this quantity of heroin from Mrs. Days and additionally he paid $4,250 for it. Those funds were later found on Mr. Drummond a week later when he was arrested.

The Court: My recollection, Ms. Seltzer, prior similar acts are admissible in these narcotic cases; am I wrong?

Ms. Seltzer: I know that. Judge Mishler held it be admissible at the last trial.

The Court: Aren't the cases pretty uniform on the subject?

Ms. Seltzer: If in fact it's shown that Mr. Drummond was involved with the heroin deal on February—

The Court: Yes. But you have the money—

Ms. Seltzer: The money was found a week later.

Mr. Corcoran: There was also testimony that Mr. Drummond's car was seen leaving—the car (15) Mr. Drummond was driving at the time was seen leaving. We are going

to introduce a document, a bill of sale seized from the trunk of the car in question at the time of Mr. Drummond's arrest. That bill of sale shows that the car was sold to Mr. Drummond, the defendant.

Ms. Seltzer: I am not arguing the law as to the admission of prior similar acts when in fact it was shown that the defendant was involved in the prior criminal act.

The Court: At the moment I am going to deny your motion subject to renewal during the point in time when the heroin is produced, if it is produced. You can anticipate at that point. Maybe we will get Mr. Corcoran to agree now before he brings it up. We will see what kind of evidence we are confronted with. Based on what Judge Mishler did before, my inclination is to deny your motion.

All right.

* * * * *

AFFIDAVIT OF MAILING

ATE OF NEW YORK
UNTY OF KINGS
STERN DISTRICT OF NEW YORK, ss:

PAUL BERGMAN, being duly sworn, says that on the 27th

of December, 1974, I deposited in Mail Chute Drop for mailing in the

Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and

te of New York, a BRIEF AND APPENDIX FOR APPELLEE

which the annexed is a true copy, contained in a securely enclosed postpaid wrapper

ected to the person hereinafter named, at the place and address stated below:

Phyllis S. Bamberger, Esq.
Federal Defender Services Unit
Legal Aid Society
509 U.S. Courthouse
Foley Square, N.Y. 10007

Paul B.

orn to before me this

day of December 74

IRENE S. COHEN
Notary Public, State of New York
Qualified in Kings County
Commission Expires March 30, 1975